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September 13, 2004

Lee Sim
Utah Division of Water Rights
1594 West North Temple, Suite 220
P.O. Box 146300
Salt Lake City, Utah 84114-6300

**Re: Comments Regarding Draft Beaver River Distribution Order and
Related Documents**

Dear Mr. Sim:

I have reviewed your letter, the draft distribution order and related material dated August 16, 2004 and have discussed the same with my clients. We appreciate all the work you and your staff have put in on this complex project. Pursuant to the invitation in your letter, we would submit for your consideration the following comments, suggestions and observations.

It should be noted that by submitting these comments my clients are in no way waiving any of the claims they may have as between them and other water users on the Beaver River system.

1. On page 1 of your August 16, 2004 letter, you indicate that the modifications to the measuring devices noted in the inspection report must be completed by April 1, 2005 and that failure to complete the necessary modifications by that date will result in the state engineer forbidding the storage of water until those modifications are made. We agree with your efforts to have accurate water measurement devices on the system so that the river commissioner can adequately account for the various direct flow and storage rights. However, since most of the modifications are to be made by Kents Lake, we would encourage them to begin the necessary modification work as soon as possible, since the high elevation of the lakes may make it difficult to complete the work after the snow begins to fall.

2. Paragraph 4 of the 1953 agreement between Kents Lake and Rocky Ford contains the so-called "one fill" provision which states that after the Kents Lake company

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has filled Three Creeks reservoir once during the season, it shall have no right as against Rocky Ford to refill Three Creeks. This "one fill" restriction is noted in the attachment to the distribution order entitled "general description and relative priority". However, as we stated at the last meeting in Beaver, we want to make sure everyone has a clear understanding as to what the "one fill" restriction means. First, your priority schedule lists the "one fill" rule only as to the rights transferred from the Kents Lake to Three Creeks. As we read the 1953 agreement, the "one fill" rule applies to all storage in Three Creeks, including the direct flow to storage changes. We would therefore request an amendment to the priority schedule to make that clear. Further, if Three Creeks fills before any storage water is taken out, the matter is relatively simple. However, if water is stored, then some water is released, then more water is stored, it becomes a bit more complex. For example, if Three Creeks is 75% full and Kents Lake then releases 200 acre feet of already stored water, and additional storage water is then placed in the reservoir, the 200 acre feet of storage previously released should not be refilled again. In any event, we believe the one fill rule should be further clarified.

3. On the general description and priority list as well as the accompanying colored chart, water rights 77-37 (A13420) and 77-1816 are listed as a source for the 1,193 acre feet of storage in Three Creeks reservoir. We believe this to be an error. The original application A13420 (now 77-37) was an application for a new appropriation filed in 1940. As you may recall, this was one of the applications addressed by the Utah Supreme Court. In its decision, the court made it abundantly clear that the new application to appropriate was junior and inferior to all other downstream senior rights, specifically including the rights of Rocky Ford. I can find nothing in the 1953 agreement between Rocky Ford and Kents Lake which subordinates this right. Therefore, to be accurate, we believe that this right (as well as water right 77-186 which has been segregated from the original application into Elk Meadows Special Service District) should either be deleted from the tables and charts, or moved to the bottom of the priority list. In bringing this matter to your attention, we are fully aware of the fact that the direct flow change applications basically cover the same amount of water, so the new appropriations may be an academic question. Nevertheless, we believe the priority and delivery schedules should be as accurate as possible.

4. Regarding the change applications which allow direct flow rights to storage in Three Creeks, we believe that the information to be contained in the commissioner's report on page 3 of the distribution order should also account for any direct flows placed into storage. The reason for this is to insure that there is no doubling up of water. In other words, if the Kents Lake users decide to store 5 cfs in Three Creeks, it needs to be insured that there is a commensurate decrease of 5 cfs in their direct flow diversions. Again, we

believe this needs to be carefully monitored and accounted for by the river commissioner and addressed in his annual report.

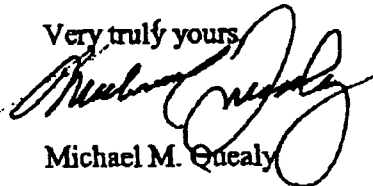
5. On page 3 of the distribution order, we are not certain whether the river commissioner's monitoring/report includes the careful monitoring of the conditions on the storage of water under the change application which moved Kents Lake storage to Three Creeks (77-177). The colored chart certain notes the conditions imposed by the Utah Supreme Court decision that the storage right rate under this right is limited to the flow which is available at South Fork, but not diverted into Kents Lake reservoir. That being said, we want to insure that adequate measuring devices are available to account for this restriction and that the river commissioner's administration of storage and his annual report accurately account for this.

6. While it has not been a major matter of discussion and while I don't believe it was part of the measuring device inspection, we believe that the river commissioner and/or staff from the Cedar City office should take a look at the various direct flow diversion points below Patterson dam to insure that the measuring devices on the other points of diversion are adequate for the river commissioner to account for the water diverted below Patterson.

Finally, after any comments are received and/or meetings held, we would strongly encourage the State Engineer to place the Distribution Order into effect beginning April 1, 2005.

Again, we appreciate all the effort that has been put into this and we hope these comments are helpful and will be taken into consideration. Please let me know if a further meeting will be scheduled to discuss the distribution order.

Very truly yours,



Michael M. Quealy

MMQ/pct

cc: Mark Truman
Jerry D. Olds
Kerry Carpenter

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